



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KWALE
PETITION NO.3 OF 2021
(FORMERLY PETITION NO.15 OF 2021 MSA)

MICHAEL KISWILI (on his own behalf of 65 others)PETITIONER

VERSUS

BASE TITANIUM LIMITED.....1ST RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....2ND RESPONDENT

COMMISSIONER OF MINES & GEOLOGY.....3RD RESPONDENT

ATTORNEY GENERAL.....4TH RESPONDENT

RULING

BACKGROUND

1. The Petition before this court is filed on 18/3/2020 by Michael Kiswili on his own behalf and that of Sixty-Five (65) other residents of Mivumoni 'B' Village within Msambweni Location Kwale County. The petitioners seek the following; -

- a. Declaration that the petitioner's rights to a clean and healthy environment have been denied and continue to be violated.
- b. Declaration that the Petitioners have a right of redress under Article 162(2)(b) of the Constitution as read together with sections 12(2)(a), (e)(3) and (7) of the Environment and Land Court Act.
- c. The Court to issue an environmental restoration order against the 1st Respondent.
- d. The Court to issue an order to compel the 2nd Respondent to revoke the Environmental Impact Assessment License issued to the 1st Respondent by the 2nd Respondent and the mining licence issued by the 3rd Respondent.

2. It is the Petitioners case that the mining activities of the 1st Respondents' resulted into excessive noise day and night due to heavy machinery operating on 24 hours basis, inhalation of titanium dust posing a health risk to expectant mothers, young children, animals and poor farm yields. They further pointed to failure by the 1st Respondent to monitor the environment under article 69(1)(f) of the Constitution, failure to provide health facilities for treatment of the residents affected by the activities and absence of public participation as required in Environmental Management and Coordination Act (EMCA).

3. The 1st Respondent filed a Notice of Motion application dated 28/4/2021 supported by the affidavit of Simon Wall, the 1st Respondents, General Manager – External Affairs. The application seeks to strike out the Petition with costs on grounds of jurisdiction. It is contended that this court lacks jurisdiction to hear and determine the case. The dispute arises from alleged wrongful actions committed or omitted by the 1st Respondent in the course of its mining operations and therefore jurisdiction was vested in the Cabinet Secretary under the provisions of Section 155(b) of the Mining Act. Consequently, this court only has appellate jurisdiction from the decision of the Cabinet Secretary.

4. The said Notice of Motion is the subject of this ruling. It is opposed by the Petitioners under a replying affidavit filed before court on 21/7/2021 and sworn by Michael Kiswili. The depositions are echoed in their submissions herein. They also filed a Notice of Preliminary objection dated 6/07/21 on the grounds that application herein is frivolous, vexatious and an abuse of the court process.

5. According to the Petitioners, great injustice would be occasioned were the petition to be struck out without them being heard.

6. The 2nd, 3rd and 4th Respondents opposed the petition as well as Notice of Motion application. They too raised a Preliminary Objection dated 14/09/2021 which form the basis of their submissions herein.

SUBMISSIONS

7. The Court on 6/07/21 directed that the application be canvassed by way of written submissions.

1st Respondents Submissions

8. The 1st Respondent relied on their Replying Affidavit to the Petition which is annexed to the Notice of Motion application. The grounds averments are largely echoed in the background to this ruling – see paragraph 3. It is further stated that the position or office of Commissioner of Mines & Geology does not exist in law and therefore not capable of being sued in these proceedings.

9. It is also urged that the 1st Respondent has fully complied with the mandatory obligations under Section 109 of the Mining Act to conduct its operations in compliance with the programme approved for the mining operations; to comply with terms and conditions of the Environmental impact assessment Licence and Environmental Social Management Plan relating to the operations approved. The lawful authority is the Cabinet Secretary for Mining. It is also contended that the 1st Respondent has obtained a valid Licence from the National Environment Management Authority (NEMA) which licence is duly audited as required under EMCA.

2nd, 3rd and 4th Respondents Submissions.

10. The 2nd, 3rd and 4th Respondent's submissions were filed on 22/11/2021.

According to Counsel this court lacks jurisdiction to determine the issues raised by dint of section 9(2)(3) of the Fair Administrative Action Act, 2015 and article 159(2) of the Constitution.

11. It is contended that the petition challenges the existence and validity of the Environmental Impact Assessment (E.I.A) yet the E.I.A and certificate of transfer of the environmental impact assessment licence dated 2-/7/2010 is annexed by the 1st Respondent as evidence. That the assessment of validity or invalidity of the EIA and transfer of the environmental impact assessment was within the jurisdiction of the 2nd respondent by dint of section 129 of the Environmental Management Coordination Act. The holding in **Joseph OJ Wang Oundo V National Environmental Management Authority & 8 Others [2015] eKLR** where the court pointed that it would be inappropriate to address issues of licence before the ELC Court without first exhausting the available statutory remedy provided under Section 129 of EMCA, that the Respondents therein would have gone to the tribunal as the ELC court had no jurisdiction.

12. The Respondents also point that in the same breath the Petitioners should have exhausted the alternative dispute resolution mechanisms under the Mining Act 2016. The dispute herein was to be determined by the Cabinet Secretary in the first instance. The court therefore had only appellate jurisdiction over the matter.

12. It was further submitted that, pursuant to Section 108 of Environmental Management & Coordination Act only the 2nd Respondent may issue an environment restoration order.

13. That the evidence tendered by the petitioners did not satisfy the required standard in a constitutional petition as was held in **Ahmed Mohammed Noor V Abdi Aziz Osman [2019] eKLR** and in proof of infringement of the petitioners right to livelihood as was held in **William Odhiambo Ramogi & 3 Others V AG & 4 Others [2020] eKLR.**

14. The Court was urged to dismiss the petition.

Petitioners submissions

15. The Petitioners submissions dated 13/7/2021 were filed on 26/7/2021. It was pointed that the Notice of Motion application was filed just before the matter was set for directions on hearing of the Petition. This was intended at delaying the matter contrary to the overriding objectives set out in Section 1A of the Civil Procedure Act Chapter 21 of the Laws of Kenya.

16 . It is averred that the Petitioners seek to have their rights to a clean and healthy environment protected. It was primarily based on Articles 42 and 70 of the Constitution. This was the main purpose for the establishment of the Environment and Land Court. Jurisdiction therefore lay squarely within this court and not on any tribunal or a cabinet secretary. The court's decision in **ELC Petition No 2 of 2018 County Government of Kitui Versus Sonata Kenya Limited & 2 Others** was relied upon to buttress this point.

16. According to the Petitioners the use of the word 'may' in Section 155(a) Mining Act connotes the Cabinet Secretary's role in resolving disputes is optional. The role was limited to inquiring into issues, assess and pay compensation as provided by the Act. Only the court had power to protect the petitioners infringed constitutional rights. To support this position counsel referred to the ruling of Justice Angote in **ELC Petition No 2 County Government of Kitui V Sonata Kenya Limited & 2 Others** where it was found that according to article 162(2) (b) of the Constitution and Section 13(1) of the Environment and Land Court Act, it is the ELC Court and not the NEMA Tribunal that has jurisdiction to hear and determine any dispute under articles 70 of the Constitution including petitions alleging violations of rights to a clean and healthy environment.

17. Counsel further emphasised that the Petitioners case was that no environmental impact assessment was conducted before commencement of the mining activities herein. Assuming it was, there was no public participation contrary to article 69(1) (d) of the Constitution. Relying on **County Government of Kitui V Sonata Kenya Limited & 2 Others** above where the court referring to the holding in **Ken Kasinga V Daniel Kiplagat Kirui & 5 Others [2015] eKLR** that where there is non-compliance to procedures for the protection of the environment including the process of public participation ‘ *then an assumption may be drawn that the right to a clean and healthy environment is under threat.*’

18. Counsel therefore urged that the petition was properly before the court and the petitioner had the right to be heard. The Notice of motion be dismissed with costs to the Petitioners.

ANALYSIS AND DETERMINATION.

19. I have considered the Notice of Motion, the grounds and the prayers sought. I have also considered responses of the other parties and the submissions filed. The issue for determination is mainly whether or not this court has the jurisdiction to hear and determine the petition.

20. The application raises the question of jurisdiction. Guided by the case of **Owners of Motor Vessel ‘Lillian Vs. Caltex Oil (Kenya) Ltd (1989) eKLR**, where the court pointed that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is obliged to decide the issue right away on the material before it, I will proceed to do so. I’m aware that according to this decision, without jurisdiction the court cannot move one more step.

21. The jurisdiction of the Environment and Land Court is derived from Article 162 (1)(2)(b) of the Constitution to hear and determine disputes relating to environment, and the use and occupation of, and title to land. This article is read together with the Environment & Land Act Sec.13 which confers the Environment and Land Court with jurisdiction as hereunder; -

(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes; -

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.

(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.

(4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.

(7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including (a) interim or permanent preservation orders including injunctions;(b) prerogative orders; (c) award of damages;(d) compensation;(e) specific performance;(g) restitution;(h) declaration; or (i) costs.

22. The petitioners seek for a declaration that their rights to a clean and healthy environment have been denied and that the Petitioners have a right of redress under Article 162(2)(b) of the Constitution as read together with sections 12(2)(a), (e)(3) and (7) of the Environment and Land Court Act. They also seek for an environmental restoration order to issue against the 1st Respondent and an order compelling the 2nd Respondent to revoke the Environmental Impact Assessment Licence issued to the 1st Respondent by the 2nd Respondent and the mining licence by the 3rd Respondent. The key reasons have been given as pollution in terms of noise, air and water. Others are absence of public participation which they termed as an indication of the threat to their right to a clean and healthy environment.

23. Having looked keenly at the prayers sought, the dominant prayer is the one seeking for a declaration that the Petitioners have rights to a clean and healthy environment. The fabric upon which the same is woven touches on the infringement of the right to a clean and healthy environment. Section 13 (3) of the **Environment and Land Court Act** which is to the effect that ‘Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution’. Consequently, the right to a clean and healthy environment can only be enforced by this court, and the same apply to the issues arising out of infringement of such rights.

24. Indeed this court has noted some orders sought which could also be dealt with under the National Environment Management Tribunal

under Section 129 thereof as well as the Director General NEMA or the Director-General, NEMA or its Committees. Obviously, the effect would then be to confer this court with appellate jurisdiction on the decisions thereof. *Article 162(2)(b) of the Constitution* also confers jurisdiction on this court. I am guided by the holding in the case of **Taib Investment Ltd vs Fahim Salim Said & 5 Others [2016] eKLR Angote J.** where the court held that: -

“..... Where we have environmental and developmental issues in a suit that are supposed to be dealt with by numerous Tribunals or bodies, and where those issues cannot be dealt with separately, it is only this court, pursuant to the provisions of Article 162(2)(b) of the Constitution, that can deal with all those issues”

The above sentiments have also been echoed by Gacheru J in **Dominic G. Ng'ang'a & another v Director General National Environment Management Authority & 4 others [2020] eKLR** .

25. Ms. Njau for the 2nd, 3rd and 4th Respondents has urged that pursuant to Section 108 of EMCA only the 2nd Respondent may issue an environment restoration order. I have also looked at this provision and I will produce the relevant part of same verbatim for ease of reference;

1. Subject to any other provisions, the Authority may issue and serve on any person in respect of any matter relating to the management of the environment an order in this part referred to as an environmental restoration order

26. My interpretation of this section is that the use of the word ‘may’ connotes discretion given to NEMA. NEMA has discretion and may do so if necessary.

The section does not have the effect of ousting the jurisdiction of this court to issue an order for restoration. This court is also aware of instances where the Court has issued such orders See **National Environment Authority & Nyamira County Government Vs Gerick Kenya Limited (2016) ELR.** and **Martin Osano Rabera & Another Vs Municipal Council of Nakuru, National Environment Authority & Another (2019) eKLR.**

27. The jurisdiction of this court to hear issues under the Mining Act has also been brought into question. In the case of **Peter Nzeki & 14 Others V Base Titanium Limited and 4 Others [2020] eKLR** Justice CK Yano expressed his views on jurisdiction of the ELC Court in determining mining and mineral disputes as follows;

“Under Article 162 (2) (b) of the Constitution, this court has the mandate to hear disputes relating to the environment and the use of, and occupation of, and title to land. Section 13(1) of the Environment and Land Court Act provides that this court has both original and appellate jurisdiction to hear all disputes relating to the environment and land.

Section 13 (2) (a) provides such disputes to include disputes relating to environment planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources. Section 13 (2) (e) makes it clear that what is set out in paragraph (a) to (d) thereof is not conclusive. The same provides that ELC can hear any other dispute relating to the environment and land, including disputes relating to mining and minerals. Therefore, in my considered view, unlike the Cabinet Secretary, this court is the only one mandated to hear and determine applications for redress for denial, violation or infringement of, or threats to right and fundamental freedoms relating to the environment and land”. I agree in toto with these observations.

28. Since the upshot of the foregoing is that this court finds that the petition is properly before it, I will leave out the other grounds for substantive hearing where parties will still have an opportunity to ventilate further on the issues.

29. This court must however register concern with the time it has taken the 1st Respondent to file the Notice of Motion application herein, approximately 16 months inclusive of court vacations and wonder why it could not be raised at the earliest opportunity. For this reason, the 1st Respondent shall bear the costs of the application.

30. The orders that commend to issue to dispose of the Notice of Motion application dated 28/4/2021 are; -

1. The Notice of Motion application dated 28/4/2021 is hereby dismissed.

2. Costs shall be borne by the 1st Respondent.

DELIVERED AND DATED AT MOMBASA THIS 10TH DAY OF FEBRUARY, 2022

A.E. DENA

JUDGE

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr. Gathuku..... for the Petitioners

Ms. Akello holding brief for Mr. Oyatsi.....for the 1st Respondent

Mrs. Njau..... for the 1st,2nd and 3rd Respondents

Mr. Denis Mwakina..... Court Assistant.